STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 26, 2014
v	No. 315945 Kent Circuit Court
DERRICK ANTHONY-DEWAYNE BROWN, Defendant-Appellant.	LC No. 12-011263-FC

Before: RONAYNE KRAUSE, P.J., and HOEKSTRA and WHITBECK, JJ.

PER CURIAM.

Defendant appeals his convictions by a jury of two counts of armed robbery, MCL 750.529, and one count of first-degree home invasion, MCL 750.110a(2). Defendant was sentenced as an habitual offender, fourth offense, to thirty to seventy years' imprisonment for each of his armed robbery convictions and twenty five to fifty years' imprisonment for home invasion, to be served concurrently to each other but consecutive to another sentence for which he had been on parole. Defendant appeals, asserting that the prosecutor made an improper civic duty argument during closing arguments and that trial counsel was ineffective for failing to object. We agree that the prosecutor made an improper remark, but because doing so was harmless, we affirm.

The victims in this matter consisted of various family members and their friends who were together in a ground-floor apartment. They all gave substantially consistent testimony that defendant approached one of the victims, who was outside smoking at the time, and produced a gun and demanded money, then forced his way into the apartment when that victim's wife opened the door to see what was going on. Defendant individually robbed several other people present, striking one of them with the gun in the process, before the victims collectively ran out the back door. After they returned to the apartment, the victims initially set out to find defendant themselves and hurt him or otherwise retaliate. Although they spent some time looking for defendant in the area, they did not locate him.

They recognized him as having recently been in the upstairs apartment, however, and knocked on the door to that apartment. One of the occupants identified defendant as "'that's my baby dad'" and apparently telephoned defendant's mother and informed her that her son had just robbed the downstairs neighbors. In her own testimony, she denied that she called defendant's

mother. Rather, she testified that she called a cell phone that had been stolen from one of the victims, which answered but there was only background conversation at the other end.

Two of the victims changed their mind about their reaction to the incident and flagged down a police officer to report the incident. Several of the victims identified defendant out of a photographic lineup two days after the incident. The officer who conducted the lineup testified that "all the identifications in this case were pretty immediate, and that although in some cases people might have some uncertainty, there was none in this case" The victims identified defendant in court and testified that they had been able to observe him clearly at the time of the robbery and home invasion. At some point after his arrest, defendant telephoned the upstairs neighbor and accused her of snitching on him.

Defendant's sole argument on appeal pertains to an argument made by the prosecutor during primary closing argument. In relevant part, the conclusion of the prosecutor's primary closing argument was as follows:

> Each one of you watched these kids [apparently a reference to the relative youthfulness of most of the victims] get up on the stand and testify, and every one of them said, "No I was going to take care of it myself, I was going to do this on the street, street justice." That's their first instinct. Is that what you would have done? Is it what I would have done? That's not the standard.
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> You know, if I had my – I don't choose my victims, my eyewitnesses, the defendant did. Okay? If I chose my – my victims, I would have had the defendant rob the – rob a society meeting of the photographic memory expert witness group one night. If I chose my victims, that's who I would have.
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> The defendant chose these kids. All right? Their first instinct was street justice. Why – why do courts exist? It is to resolve wrongs in a civilized manner in the courtroom. Show these kids, show them that they can trust the system. Thank you.

Defense counsel made no objection, but rather proceeded with his own closing argument. The prosecutor's remark about showing the victims that they could trust the system was not commented on further.

No objection was made to the allegedly improper remark made by the prosecutor. This issue is therefore unpreserved. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). In the absence of an objection, a claimed instance of prosecutorial misconduct is reviewed de novo and in context to determine whether, in the particular case before the court, the prosecutor committed plain error that affected defendant's substantial rights. *Id*. at 475-476. Even if preserved and even if the prosecutor committed a nonconstitutional error, reversal is only warranted if it appears more likely than not that the error was outcome determinative. *People v Brownridge*, 237 Mich App 210, 216; 602 NW2d 584 (1999). A general claim that the defendant was denied his or her due process right to a fair trial is a claim of nonconstitutional error, and defendant has not asserted that a specific constitutional right was violated. See *People v Blackmon*, 280 Mich App 253, 261-262, 269; 761 NW2d 172 (2008).

A prosecutor may not urge the jury to convict on the basis of a "civic duty." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). A prosecutor may also not urge the jury to convict on the basis of sympathy for a victim. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). The prosecutor's exhortation to the jury to "show these kids" whose first instinct had been street justice "that they can trust the system" bridges the gap between an appeal to sympathy and an appeal to civic duty. Although an understandable, and indeed noble, sentiment, this remark unambiguously injected issues "more comprehensive than [the] defendant's guilt or innocence and unfairly encourage[d] jurors not to make reasoned judgment." See *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). The remark was improper and constituted prosecutorial misconduct.

However, the remark in this case was not particularly egregious and its appeal to the jury's emotions rather than their rationality was fairly minimal in contrast to, for example, repeated references to a "'poor innocent baby,'" *Watson*, 245 Mich App at 591, and it was hardly an argument to the effect that the jury would play a role in stemming some conjectured tide of violence in the community. Cf., *People v Cooper*, 236 Mich App 643, 651; 601 NW2d 409 (1999) (condemning the prosecutor's implied request that the jury "send[] a message of disapproval of gun-related violence in Detroit" before a jury comprised of Detroit residents). Rather, the remark was isolated, brief, and comparatively bland; furthermore, the trial court explicitly instructed the jury to disregard any sympathy or prejudice and reach a decision based only on the evidence, which excluded the attorneys' arguments. See *People v Akins*, 259 Mich App 545, 563 n 16; 675 NW2d 863 (2003).

Furthermore, the remark was not completely unrelated to the victims having initially set out on an undesirable and unseemly mission of vigilante vengeance, but of little, if any, bearing on any factual question the jury needed to consider. Defendant's theory of the case was, in any event, that all of the prosecution's eyewitnesses were lying. Clearly, had the jury believed defendant's theory of the case, an exhortation to show those witnesses that they could "trust the system" would have been deleterious to the prosecution's case. The fact that the victims may not have been the most sympathetic figures for which any prosecutor could wish was a fact amply supported by the evidence and a fair matter for commentary during closing argument. Prosecutors need not restrain themselves to the "blandest possible terms." *People v Pawelczak*, 125 Mich App 231, 238; 336 NW2d 453 (1983). Although the remark was technically improper, it was of no consequence, so we need not consider whether trial counsel rendered ineffective assistance by failing to object.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Joel P. Hoekstra
/s/ William C. Whitbeck